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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO BARRETO,

Defendant and Appellant.

B265438

(Los Angeles County
Super. Ct. No. BA425777)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael D. Abzug, Judge. Affirmed as modified.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Sergio Barreto was convicted of several offenses and a prior prison term allegation was found to be true within the meaning of Penal Code section 667.5, subdivision (b).¹ On appeal, he contends the evidence was insufficient to establish that he served a prior prison term. We disagree. However, Barreto also contends his sentence must be modified in two respects. The prosecution concedes the errors and we agree. We therefore modify the sentence and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Underlying Facts

Defendant was a member of the Lincoln Heights gang. On November 25, 2007, he was personally served with a copy of a gang injunction, prohibiting active members of the gang from doing certain acts within a defined “safety zone.” One of the prohibited acts was possessing a firearm.

The intersection of Broadway and Sichel Street was within the gang injunction safety zone. On June 4, 2014, at 8:30 a.m., defendant was spotted by police crossing the street, with his girlfriend, at the intersection. When defendant saw the police, he fled, discarding a loaded semi-automatic firearm as he ran. One police officer recovered the weapon while another chased

¹ Unless otherwise designated, all further statutory references are to the Penal Code.

defendant. A perimeter was established and defendant was eventually located and arrested.

2. *Charges*

Defendant was charged by information with: (1) possession of a firearm by a felon (§ 29800, subd. (a)(1)); (2) contempt of court for violation of the gang injunction (§ 166); and (3) carrying a loaded firearm (§ 25850). As to the first count, possession of a firearm by a felon, it was further alleged that defendant committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). Similarly, as to the third count, carrying a loaded firearm, it was further alleged that defendant was an active participant in a criminal street gang at the time of the offense (§ 25850, subd. (c)(3)).

Subsequently, the information was amended by interlineation to allege a prior prison term within the meaning of section 667.5, subdivision (b).

3. *Trial*

Trial on the prior prison term allegation was bifurcated; defendant subsequently waived the right to a jury trial on that allegation. Defendant did, however, stipulate that he was previously convicted of a felony, for the purposes of the possession of a firearm by a felon count.

At trial, defendant did not dispute his possession of the loaded firearm or his violation of the gang injunction. The only

truly contested issue at trial surrounded the gang enhancements on the first and third counts. The prosecution introduced expert opinion testimony that defendant was an active member of the gang, and that an active gang member carrying a firearm in the intersection under the circumstances of the offense would have done so for the benefit of the gang. Defendant, in contrast, presented expert testimony suggesting he was not acting for the benefit of the gang, but was instead carrying the firearm for personal protection as he walked his girlfriend to the bus stop.

The jury sided with defendant. Defendant was convicted of all three charges, but the gang enhancements were found not true.

The matter then proceeded to a bench trial on the prior prison term allegation. The prosecutor requested the court take judicial notice of the superior court file of defendant's prior felony conviction. The court reviewed the file, which revealed that defendant had originally been sentenced to probation, but, on October 31, 2012, probation was revoked and he was ordered to serve 16 months in jail. The court asked counsel, "Any objection to the court taking judicial notice of the fact that defendant was convicted for violation of section 594(a) and served a state prison term?"² Defense counsel stated that he "obviously objects."

² On appeal, defendant states that the court "did not take judicial notice that [he] was remanded to prison, or that he

When the court asked for the basis of the objection, counsel identified hearsay. The court overruled the objection, as Evidence Code section 452 allowed judicial notice of the records. As defendant had no further argument, the court found the prior prison term allegation to be true.³

4. *Sentencing*

Defendant was sentenced to four years in prison on count 1, calculated as follows: the high term of three years, plus an additional year for the prior prison term. Defendant was sentenced to a concurrent term of 364 days in jail for each of the remaining two counts.

Defendant filed a timely notice of appeal.

served a prison term.” The contention is meritless. Although the court did not specifically state it was taking judicial notice of the commitment order, the court reviewed the file and stated it intended to take judicial notice of both the fact of conviction and the fact that defendant served a prison term.

³ Subsequently, at the sentencing hearing, the trial court was concerned that it might not have given defense counsel an opportunity to argue the sufficiency of the evidence, as opposed to its admissibility. The court asked counsel, “is there anything further that you want to state with respect to the sufficiency of the evidence regarding the prior that I should consider, other than you’re objecting to the admissibility of the evidence relied upon by the people?” Defense counsel replied, “No, Your Honor, not in terms of the sufficiency of the evidence.”

DISCUSSION

On appeal, defendant first argues that the evidence of which the trial court took judicial notice was insufficient to support the true finding on the prior prison term allegation. We disagree. He next argues that his 364-day jail term for violating the gang injunction was legally excessive: the offense may only be punished by six months in jail. Finally, he argues his sentences on counts 2 and 3 should have been stayed under section 654. The Attorney General concedes the latter two points, and we agree.

1. *There Was Sufficient Evidence of the Prior Prison Term*

Under section 667.5, subdivision (b), a defendant's felony sentence may be enhanced by one year "for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170" "Imposition of a sentence enhancement under Penal Code section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. [Citation.]" (*People v. Tenner* (1993) 6 Cal.4th 559, 563 (*Tenner*).)

Prior to the Supreme Court's decision in *Tenner*, there had been a dispute in the Courts of Appeal as to whether these four

elements could be established by an abstract of judgment and prison commitment form relating to the prior conviction, aided by the presumption that official duty has been regularly performed (Evid. Code, § 664).

On one side were cases exemplified by *People v. Jones* (1988) 203 Cal.App.3d 456, 458 (*Jones*), holding such proof to be inadequate. In *Jones*, the court concluded that the abstract could establish the first element (previous conviction); the commitment and presumption could establish the second element (imprisonment); and the date of the abstract compared to the date of the current offense could establish the fourth element (did not remain free from commission of a new offense for five years). (*Id.* at pp. 459-460.) However, neither the documents nor the presumption constituted evidence of the third element – that defendant had actually completed the term of imprisonment. (*Id.* at p. 460.)

In contrast to *Jones* were cases like *People v. Castillo* (1990) 217 Cal.App.3d 1020 (*Castillo*). The *Castillo* court disagreed with *Jones*, holding the abstract and commitment order were, in fact, sufficient to establish the truth of a section 667.5, subdivision (b) allegation. (*Castillo*, at p. 1024.) As for the disputed third element, that the defendant had actually served his term of imprisonment, the *Castillo* court noted that, because the defendant subsequently committed his next offense when he

was out of prison, the trial court could infer from this fact that the defendant had completed his prison term for the prior offense. In the absence of evidence that the defendant had escaped or was released before his sentence had been served, the trial court was justified in finding the defendant had served a completed term of imprisonment for the prior. (*Id.* at pp. 1024-1025.)

With other appellate courts lining up behind *Jones* and *Castillo*, the Supreme Court granted review in *Tenner* to resolve the issue. The Supreme Court then sided with *Castillo*, expressly concluding that “an abstract of judgment and a state prison commitment form, considered in light of the unrebutted presumption that an official duty is regularly performed [citation] constitute sufficient evidence to support a finding that a defendant completed a prior prison term” for purposes of section 667.5, subdivision (b). (*Tenner, supra*, 6 Cal.4th at p. 561.) As to the specific issue of evidence on the third element, that a prison term was completed, the court noted that, just as it is reasonable to infer from a commitment order that officials regularly performed their duty to convey the defendant to prison, it is reasonable to infer that “prison officials regularly performed their duty to see that defendant’s sentence was carried out.” (*Id.* at p. 566.) Indeed, “a defendant properly sentenced and delivered to prison will, as a practical matter, always complete a prison term unless something unusual occurs. [Citation.] It is therefore

rational to infer the ultimate fact of completion of the prison term from the existence of the documents reflecting the defendant's commitment to prison. [Citation.]” (*Ibid.*) The Supreme Court expressly disapproved of *Jones* to the extent it was inconsistent.⁴ (*Tenner*, at p. 566, fn. 2.)

Tenner controls this case. We have obtained the superior court file of which the trial court took judicial notice, and can confirm that it includes both a felony abstract of judgment and a commitment order, committing defendant to county jail for 16 months under section 1170, subdivision (h).⁵ We consider the four statutory elements: (1) that defendant was previously convicted of a felony is established by the abstract; (2) that defendant was imprisoned as a result of that conviction is established by the commitment order and the official duty presumption; (3) that defendant completed that term of imprisonment is established by the commitment order, the official duty presumption, and the lack of any evidence to the

⁴ Defendant relies on *Jones*, suggesting that *Tenner* disapproved *Jones* on another point – relating to whether there can be a retrial on a section 667.5 sentence enhancement. This is simply incorrect. *Tenner* disapproved *Jones* on precisely the point for which defendant cites it.

⁵ By its express terms, section 1170, subdivision (h) applies to felony sentences served in county jail. (*Tenner*, *supra*, 6 Cal.4th at p. 561.)

contrary; and (4) that defendant did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction is established by the fact that defendant was committed to jail on October 31, 2012 and committed the current felony on June 4, 2014. The evidence is sufficient to establish the prior prison term enhancement.

2. *The Sentence for Violating the Gang Injunction Was Erroneous*

Section 166 identifies as contempt of court the violation of a court order. It was undisputed that defendant violated the gang injunction order by possessing a firearm in the safety zone. However, it appears that, from the information onward, the parties misidentified the applicable subdivision of section 166.

Subdivision (a)(9) of section 166 identifies as contempt the “[w]illful disobedience to the terms of an injunction that restrains the activities of a criminal street gang or any of its members, lawfully issued by a court” The parties agree that this is the subdivision defendant violated. However, defendant was charged with violating section 166, subdivision (c)(1), which applies to the violation of protective orders relating to victims and witnesses. (See § 136.2.) The difference is significant because violation of subdivision (c)(1) is punishable by imprisonment of not more than a year in jail, but violation of subdivision (a)(9) has a six-month maximum (§ 19).

Defendant argues that he therefore should have been sentenced to six months in jail on this count. The Attorney General agrees, as do we.

3. *The Sentences on Counts 2 and 3 Must Be Stayed*

Section 654, subdivision (a) provides, in pertinent part, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Under the statute, “[a] course of conduct that constitutes an indivisible transaction violating more than a single statute cannot be subjected to multiple punishment. [Citation.]” (*People v. Martin* (2005) 133 Cal.App.4th 776, 781.) “Whether multiple convictions are part of an indivisible transaction is primarily a question of fact. [Citation.] We review such a finding under the substantial evidence test [citation]; we consider the evidence in the light most favorable to respondent and presume the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” (*Ibid.*)

Although defendant was convicted of three crimes, they all arose from a single act: carrying a loaded gun into the safety zone. At the sentencing hearing, defense counsel suggested “that all of the charges merged,” and the trial court agreed. Yet, when it came time to impose sentence, the court mistakenly imposed

concurrent sentences on counts 2 and 3, rather than staying them.⁶

Given the court's recognition that the three counts arose from the same act with the same objective, defendant argues that the concurrent terms on counts 2 and 3 should have been stayed. The prosecution concedes the error, and we agree.

DISPOSITION

Defendant's sentence is modified as follows: (1) the sentence on count 2 is reduced to six months in jail, stayed under section 654; and (2) the sentence on count 3 is also stayed under section 654. The superior court is directed to prepare an amended abstract of judgment reflecting the modified sentence and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.

⁶ At least with respect to count 3, this does appear to have been an inadvertence. The court initially indicated an intention to stay that sentence under section 654 "because a violation in Count 3 would be an additional punishment for the same act" as count 1. But no stay was actually imposed.